Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-26–03 OF 2019(W) AND 02(f)-27-03 OF 2019(W)
ZAWAWI SALLEH, VERNON ONG, ABDUL RAHMAN SEBLI, ZALEHA YUSOF FCJJ AND BADARIAH SAHAMID JCA
27 AUGUST 2020

Arbitration — Arbitrator — Jurisdiction — Whether arbitrator had power under s 21(3)(b) of Arbitration Act 2005 ('the AA') to draw on his own knowledge and expertise to determine loss of profit suffered by subcontractor owing to wrongful termination of contract — Whether such action on arbitrator's part without giving parties in arbitration opportunity to refute his opinion did not mean arbitrator had breached rules of natural justice within the meaning of s 37(1)(b)(ii) read with s 37(2)(b) of the AA — Whether arbitrator used correct test to find subcontract had been unlawfully terminated — Whether arbitrator's awards to subcontractor for completed works and for loss of profit were purely factual findings which the courts should not have interfered with whether under s 37 and/or s 42 of the AA

The respondent appointed the appellant as its subcontractor to carry out certain construction works. Clause 12 of the subcontract entitled the respondent to terminate the subcontract if the works was delayed 'more than 20% financially'. Claiming that the appellant had crossed that margin, the respondent terminated the subcontract. The appellant argued that the termination was unlawful and said the respondent had delayed giving it possession of the work site to carry out the work. The parties appointed a professional engineer and chartered arbitrator to arbitrate their dispute. In his award, the arbitrator ruled that the termination of the subcontract was unlawful and ordered the respondent to pay the appellant RM1,409,154.75 for works which had been completed and RM942,109.52 for loss of profit the appellant had suffered due to the wrongful termination. Among other things, the arbitrator found on the factual evidence that the percentage of delay in cl 12 was not exceeded and therefore the termination was premature. The appellant applied to the High Court to enforce the award under s 38 of the Arbitration Act 2005 ('the AA') whilst the respondent applied to set aside or vary the award under ss 37 and 42 of the AA. Section 37 was relied upon on the basis the arbitrator had determined on his own the loss of profit payable to the appellant without giving the parties an opportunity to address the issue or submit on it; and, therefore, the respondent had breached the rules of natural justice and/or exceeded his jurisdiction pursuant to s 37(2)(b) and 37(1)(a)(v) of the AA. Section 42, on the other hand, was relied upon to set aside the whole arbitral award on the ground there were errors of law. The High Court dismissed the

application to enforce the award, varied the award by ruling that the subcontract was validly terminated by the respondent, set aside the 'loss of profit' granted under the award and affirmed the sum that was granted for completed works. The High Court's decision was based wholly on s 42 of the AA and did not address s 37 at all. The High Court was of the view the arbitrator had determined the question of delay by wrongly applying the test of physical progress of works instead of financial progress as required by cl 12 of the subcontract. The appellant appealed to the Court of Appeal ('COA') against the High Court's variation of the award and the dismissal of its application to enforce it. The respondent cross-appealed to vary the High Court's decision on the ground the sum awarded for completed works was wrongly assessed by the arbitrator. The COA unanimously dismissed the appellant's appeal and set aside the entire arbitral award pursuant to both ss 37 and 42 of the AA. The COA held that the whole award had to be set aside for breach of the rules of natural justice and the arbitrator exceeding his jurisdiction because he had relied on extraneous evidence which he himself 'invented' to determine the 'loss of profit' payable to the appellant without giving the parties prior notice of that evidence or allowing them an opportunity to submit on it. The COA did not make any ruling on whether the respondent's purported termination of the subcontract was lawful. The appellant was granted leave to appeal to the Federal Court against the COA's decision. Among the leave questions was the question whether: (a) an arbitrator who was an engineer and well-acquainted with the construction industry would breach the rules of natural justice if he relied on his own knowledge and expertise to determine loss of profit payable by one party in the arbitration to the other; and (b) the arbitrator's decision on the value of completed works was a 'question of law arising out of the award'.

Held, unanimously allowing the appeals:

(1) Given the fact that the arbitrator and the High Court came to diametrically opposite conclusions on the legality of the purported termination of the subcontract, the COA should have decided which of the two was right. The COA, however, brushed aside the issue as being 'unnecessary', obviously on the ground the arbitrator's failure to give the appellant the right to submit on the 'loss of profit' issue alone was enough to set aside the entire award. The COA did not take the correct approach. Clearly, the question of whether the termination of the subcontract was lawful or not was crucial in determining the legality of the sums awarded for 'loss of profit' and for value of works completed (see paras 47–49).

(2) The arbitrator in the present case was a professional engineer and a Fellow of the Chartered Institute of Arbitrators and he had the requisite special knowledge and expertise that entitled him to hold that in the Malaysian construction industry 'it was almost a norm when asked to indicate a 'profit and attendance' for having to manage a nominated subcontractor,

most contractors would include a margin of 10–15%'. The arbitrator was competent to draw on his own knowledge and expertise on the existence of the 10-15% 'no profit risk' norm in the Malaysian construction industry without giving the parties the opportunity of answering it and showing that his view was wrong. And for the arbitrator to do that in the instant case was not something that was not reasonably foreseeable or which caused significant surprise to the respondent that his failure to give the parties the opportunity to submit on the issue could be said to have amounted to a serious breach of the rules of natural justice within the meaning of s 37(1)(b)(ii) read together with s 37(2)(b) of the AA (see paras 90–91, 99 & 144).

(3) The respondent's argument that actual evidence (ie, evidence of the 10–15% no risk profit margin for profit and attendance) had to be produced before the arbitrator could draw on his own knowledge and expertise under s 21(3)(b) of the AA had to be rejected because that argument defeated the object behind s 21(3)(b) and rendered the provision otiose. Effect had to be given to s 21(3(b) of the AA to put into effect Parliament's intention to allow the arbitral tribunal to draw on its 'own knowledge and expertise'. Actual evidence was the very antithesis of a person's own knowledge and expertise. Unless it could be shown that the arbitrator's own knowledge and expertise on any fact in issue was plainly and unarguably wrong, the court had to be very slow to interfere with his findings. On the evidence before him in the instant case, the arbitrator was prepared to rule that the appellant had successfully made out its case for a 25% profit, but because of contingencies, the arbitrator reduced it to 10% (for the remaining drainage works) and 7.5% (for the box culvert works) (see paras 61–62, 100–102 & 106).

(4) Given the evidence before the arbitrator, the question that he relied on 'extraneous evidence' which he 'invented' or 'thought up' (ie, of the 10–15% no risk profit norm for P&A in the Malaysian construction industry) did not arise at all. Similarly, the question that he had breached the rules of natural justice in failing to give the parties the opportunity to submit on the norm also did not arise. Even if the parties were denied of the opportunity to submit on the matter, the breach was not of such gravity or materiality as to have affected the outcome of the arbitrator's decision on the loss of profit award. Since the arbitrator's loss of profit ruling was based on the evidence before him and the inferences to be drawn therefrom, the courts below were wrong in setting aside the loss of profit award either under ss 37 or 42 of the AA or under both provisions (see paras 108–110).

(5) The sum awarded by the arbitrator for completed works was based purely on a factual finding and did not involve any question of law. He came to the factual conclusion that the delay in financial progress as at the date of

termination was below 20% and therefore the respondent had prematurely invoked the termination clause. Premised on that finding and the finding that the percentage of actual financial progress was 28%, the arbitrator ruled that the termination of the subcontract was unlawful. The arbitrator had correctly applied the financial delay test to his factual finding which meant that the subcontract was unlawfully terminated by the respondent when the financial delay threshold was not exceeded. The courts below wrongly interfered with these correct findings of fact of the arbitrator by taking the view that he had wrongly applied the physical delay test instead of the financial delay test in deciding the legality of the termination of the subcontract (see paras 120, 126–127, 133–134 & 136).

[Bahasa Malaysia summary

Responden melantik perayu sebagai subkontraktornya untuk melaksanakan kerja-kerja pembinaan tertentu. Klausa 12 subkontrak memberikan hak kepada responden untuk menamatkan subkontrak sekiranya kerja-kerja tertangguh 'lebih dari 20% dari segi kewangan'. Mendakwa bahawa perayu telah melepasi margin tersebut, responden menamatkan subkontrak. Perayu berpendapat bahawa penamatan tersebut adalah tidak sah dan menyatakan bahawa responden telah menangguhkan penyerahan tapak untuk melaksanakan kerja. Pihak-pihak melantik jurutera profesional dan penimbang tara untuk menyelesaikan pertikaian mereka. Dalam awardnya, penimbang tara memutuskan bahawa penamatan subkontrak adalah tidak sah dan memerintahkan responden membayar perayu sebanyak RM1,409,154,75 untuk kerja-kerja yang telah disiapkan dan RM942,109.52 untuk kehilangan keuntungan yang ditanggung oleh perayu kerana penamatan secara salah. Selanjutnya, dapatan penimbang tara pada keterangan fakta bahawa peratusan kelewatan dalam klausa 12 adalah tidak dilepasi dan oleh itu penamatan tersebut adalah pramatang. Perayu memohon kepada Mahkamah Tinggi untuk menguatkuasakan award di bawah s 38 Akta Timbang Tara 2005 ('ATT') sementara responden memohon untuk mengetepikan atau mengubah keputusan di bawah ss 37 dan 42 dari ATT. Seksyen 37 diguna pakai berdasarkan alasan bahawa penimbang tara telah menentukan sendiri kerugian keuntungan yang harus dibayar kepada perayu tanpa memberikan peluang kepada pihak-pihak untuk menjawab isu tersebut atau menghujahkannya; dan, oleh itu, responden telah melanggar peraturan keadilan semula jadi dan/atau melampaui bidang kuasanya menurut s 37(2)(b) dan 37(1)(a)(v) ATT. Seksyen 42 pula diguna pakai untuk mengetepikan keseluruhan award timbang tara dengan alasan terdapat kekhilafan undang-undang. Mahkamah Tinggi menolak permohonan untuk menguatkuasakan award tersebut, mengubah award dengan memutuskan bahawa subkontrak ditamatkan secara sah oleh responden, mengetepikan 'kerugian keuntungan' yang dibenarkan di bawah award dan mengekalkan jumlah yang dibenarkan untuk kerja-kerja yang telah disiapkan. Keputusan Mahkamah Tinggi adalah sepenuhnya

berdasarkan kepada s 42 ATT dan sama sekali tidak mengambil kira s 37. Mahkamah Tinggi berpendapat penimbang tara telah menentukan persoalan kelewatan dengan salah mengguna pakai ujian kemajuan fizikal kerja-kerja dan bukannya kemajuan kewangan seperti yang dikehendaki oleh klausa 12 subkontrak. Perayu merayu ke Mahkamah Rayuan ('MR') terhadap perubahan award oleh Mahkamah Tinggi dan penolakan permohonannya untuk menguatkuasakannya. Responden membuat rayuan balas untuk mengubah keputusan Mahkamah Tinggi dengan alasan jumlah yang diberikan untuk kerja-kerja yang telah disiapkan ditaksirkan dengan salah oleh penimbang tara. MR sebulat suara menolak rayuan perayu dan mengetepikan keseluruhan award timbang tara berdasarkan kedua-dua ss 37 dan 42 ATT. MR memutuskan bahawa keseluruhan award harus diketepikan kerana melanggar peraturan keadilan semula jadi dan penimbang tara yang melampaui bidang kuasa kerana beliau bergantung pada bukti luar yang beliau sendiri 'cipta' untuk menentukan 'kerugian keuntungan' yang harus dibayar kepada perayu tanpa memberi notis terlebih dahulu kepada pihak berkenaan bukti tersebut atau memberi peluang kepada mereka untuk menghujahkannnya. MR tidak membuat keputusan sama ada dakwaan penamatan subkontrak tersebut adalah sah. Perayu mendapat kebenaran untuk mengemukakan rayuan ke Mahkamah Persekutuan terhadap keputusan MR. Di antara persoalan kebenaran rayuan ialah persoalan sama ada: (a) penimbang tara yang merupakan jurutera dan berpengalaman dengan industri pembinaan tela melanggar peraturan keadilan semula jadi sekiranya beliau bergantung pada pengetahuan dan kepakarannya sendiri untuk menentukan kerugian keuntungan yang harus dibayar oleh satu pihak dalam timbang tara kepada yang lain; dan (b) keputusan penimbang tara mengenai nilai kerja-kerja yang telah siap adalah 'persoalan undang-undang yang berbangkit dari award'.

Diputuskan, sebulat suara membenarkan rayuan:

(1) Berdasarkan kepada fakta bahawa penimbang tara dan Mahkamah Tinggi membuat kesimpulan yang bertentangan mengenai kesahihan penamatan subkontrak tersebut, MR seharusnya memutuskan berdasarkan yang mana satu adalah tepat. MR, bagaimanapun, mengenepikan isu tersebut sebagai 'tidak wajar', bahawa jelas dengan alasan kegagalan penimbang tara untuk memberikan hak kepada perayu untuk mengemukakan issu 'kehilangan keuntungan' sudah memadai untuk mengetepikan keseluruhan award. MR tidak mengambil pendekatan yang betul. Jelas sekali, persoalan sama ada penamatan subkontrak tersebut adalah sah atau tidak adalah penting dalam menentukan kesahihan jumlah yang diawardkan untuk 'kehilangan keuntungan' dan untuk nilai kerja yang telah disiapkan (lihat perenggan 47–49).

(2) Penimbang tara dalam kes semasa adalah jurutera profesional dan Fellow of the Chartered Institute of Arbitrators dan beliau memiliki

pengetahuan dan kepakaran khusus yang mewajarkan beliau untuk memegangnya dalam industri pembinaan Malaysia 'adalah menjadi kebiasaan apabila disoal untuk menunjukkan 'profit and attendance' kerana dalam melantik subkontraktor, kebanyakan kontraktor akan merangkumi margin 10–15%'. Penimbang tara berkeupayaan untuk menggunakan pengetahuan dan kepakarannya sendiri mengenai kewujudan norma 'keuntungan tanpa risiko' 10–15% dalam industri pembinaan Malaysia tanpa memberi peluang kepada pihak-pihak untuk menjawabnya dan menunjukkan bahawa pandangan beliau salah. Dan bagi penimbang tara untuk melakukan perkara itu dalam kes semasa bukanlah sesuatu yang tidak dapat diramalkan secara munasabah atau yang menyebabkan kejutan yang ketara kepada responden bahawa kegagalan beliau memberi peluang kepada pihak-pihak untuk menghujahkan isu tersebut boleh dikatakan pelanggaran peraturan keadilan semula jadi yang serius dalam makna s 37(1)(b)(ii) dibaca bersama dengan s 37(2)(b) ATT (lihat perenggan 90–91, 99 & 144).

(3) Hujahan responden bahawa bukti sebenar (iaitu bukti 10–15% margin keuntungan tanpa risiko untuk profit and attendance) harus dikemukakan sebelum penimbang tara dapat menggunakan pengetahuan dan kepakaran beliau di bawah s 21(3)(b) ATT harus ditolak kerana hujahan tersebut bertentangan dengan tujuan disebalik s 21(3)(b) dan menjadikan peruntukan tersebut tidak berkesan. Penekanan harus diberikan kepada s 21(3)(b) ATT untuk melaksanakan tujuan Parlimen dalam membenarkan mahkamah timbang tara untuk menggunakan 'pengetahuan dan kepakarannya sendiri'. Bukti sebenarnya adalah antitesis dari pengetahuan dan kepakaran seseorang. Kecuali sekiranya dapat ditunjukkan bahawa pengetahuan dan kepakaran penimbang tara sendiri mengenai apa-apa fakta melalui isu adalah nyata dan salah, mahkamah harus berhati-hati untuk mengubah dapatan tersebut. Berdasarkan bukti yang ada di hadapannya untuk kes semasa, penimbang tara telah bersedia untuk memutuskan bahawa perayu telah berjaya membuktikan kesnya dengan keuntungan 25%, tetapi kerana terdapat keadaan luar biasa, penimbang tara mengurangkannya menjadi 10% (untuk kerja saliran) dan 7.5% (untuk kerja kotak pelantar) (lihat perenggan 61–62, 100–102 & 106).

(4) Berdasarkan bukti di hadapan penimbang tara, persoalan yang disandarkan oleh beliau pada 'bukti luar' yang beliau 'cipta' atau 'fikirkan' (iaitu, dari norma keuntungan tanpa risiko 10–15% untuk P&A dalam industri pembinaan Malaysia) tidak berbangkit sama sekali. Begitu juga, pertanyaan bahawa beliau telah melanggar peraturan keadilan semula jadi kerana gagal memberikan peluang kepada pihak-pihak untuk berhujah pada perkara tersebut juga tidak timbul. Sekalipun pihak-pihak tersebut tidak diberi peluang untuk berhujah terhadap perkara tersebut, pelanggaran tersebut bukan sebegitu berat atau secara materialnya

A sehingga mempengaruhi keputusan penimbang tara terhadap award kerugian keuntungan. Oleh kerana keputusan kerugian keuntungan oleh penimbang tara adalah berdasarkan bukti di hadapannya dan kesimpulan harus dibuat, mahkamah bawahan telah terkhilaf dalam mengenepikan award kerugian keuntungan sama ada di bawah ss 37 atau 42 dari ATT atau di bawah kedua-dua peruntukan tersebut (lihat perenggan 108–110).

(5) Berdasarkan bukti di hadapan penimbang tara, persoalan yang disandarkan oleh beliau pada 'bukti luar' yang beliau 'cipta' atau 'fikirkan' (iaitu, dari norma keuntungan tanpa risiko 10–15% untuk P&A dalam industri pembinaan Malaysia) tidak berbangkit sama sekali. Begitu juga, pertanyaan bahawa beliau telah melanggar peraturan keadilan semula jadi kerana gagal memberikan peluang kepada pihak-pihak untuk berhujah pada perkara tersebut juga tidak timbul. Sekalipun pihak-pihak tersebut tidak diberi peluang untuk berhujah terhadap perkara tersebut, pelanggaran tersebut bukan sebegitu berat atau secara materialnya sehingga mempengaruhi keputusan penimbang tara terhadap award kerugian keuntungan. Oleh kerana keputusan kerugian keuntungan oleh penimbang tara adalah berdasarkan bukti di hadapannya dan kesimpulan harus dibuat, mahkamah bawahan telah terkhilaf dalam mengenepikan award kerugian keuntungan sama ada di bawah ss 37 atau 42 dari ATT atau di bawah kedua-dua peruntukan tersebut (lihat perenggan 108–110).]

Cases referred to

Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd 'The MV Pamphilos' [2002] All ER (D) 94 (Nov); [2002] Vol 2 681 (refd)

Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA Civ 84, CA (refd)

Exceljade Sdn Bhd v Bauer (M) Sdn Bhd [2013] MLJU 1202, HC (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (refd)

Fox and others v P G Wellfair Ltd; Fisher and another v P G Wellfair Ltd [1982] 2 EGLR 11, CA (refd)

Geogas SA v Trammo Gas Ltd, The Baleares [1993] 1 Lloyd's Rep 215, CA (refd)

Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd [2010] MLJU 311; [2010] 1 LNS 279, HC (refd)

Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd [2000] 3 NZLR 318, CA (refd)

Guardcliffe Properties Ltd v City & St James [2003] 2 EGLR 16, Ch D (refd)

Handley v Nationwide Anglia Building Society [1992] 2 EGLR 113, QBD (refd)

Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413, FC (refd)

Jordeson & Co v Stora Koppabergs Bergslags Akt (1931) 41 Ll L Rep 201, KBD (refd)
Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (refd)
Kyburn Investments Ltd v Beca Corporate Holdings Ltd [2015] 3 NZLR 644, CA (refd)
Lec Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor [2000] 3 MLJ 339, CA (refd)
Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd [2013] 5 MLJ 98; [2013] 8 CLJ 655, HC (refd)
Maimunah bt Deraman (practising as an architect under the name of D' Mai Architect) v Majlis Perbandaran Kemaman [2010] MLJU 1711, HC (refd)
Majlis Amanah Rakyat v Kausar Corp Sdn Bhd [2009] MLJU 1697, HC (refd)
Mancon Bhd v Wembley Construction Sdn Bhd & Anor [1997] MLJU 23; [1997] 1 LNS 294, HC (refd)
Mediterranean and Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd [1948] 2 All ER 186, KBD (refd)
Methanex Motunui Ltd v Spellman [2004] 1 NZLR 95, HC (refd)
Oleificio Zucchi SpA v Northern Sales Ltd [1965] 2 Lloyd's Rep 496, QBD (refd)
Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113, CA (refd)
Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] 2 MLJ 697, CA (refd)
R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531, HL (refd)
Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd [2018] 3 MLJ 608, CA (refd)
Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83, HC (refd)
Trustees of Rotoaira Forest Trust v Attorney-General [1999] 2 NZLR 452, HC (refd)
Xerox Canada Ltd v MPI Technologies Inc [2006] OJ No 4895 (refd)
Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14, QBD (refd)

Legislation referred to

Arbitration Act 1996 [NZ] s 3(1)(b), Schedule 1, rr 34(2)(b)(ii), 34(6)(b)(i), (6)(b)(ii)
Arbitration Act 1996 [UK] s 68
Arbitration Act 2005 ss 8, 9, 20, 21, 21(3)(b), 36, 37, 37(1), (1)(a)(v), (1)(b)(ii), (2)(b)(ii), (3), 38, 42, 42(1), (2), (3), (4)
Interpretation Acts 1948 and 1967 s 17A

Robert Lazar (Felix Dorairaj and Annette Rachel Edwin with him) (Dorairaj Low & Teh) for the appellant.
Nitin Nadkarni (Foo Joon Liang, Crystal Wong Wai Chin, Lee Xin Div, Lee Zhe Ying and Teh Wai Fung with him) (Gan Partnership) for the respondent.

Abdul Rahman Sebli FCJ (delivering judgment of the court):

[1] There were two appeals before us, namely Civil Appeal No 02(f)-26–03 of 2019(W) ('Appeal 26') and Civil Appeal No 02(f)-27–03 of 2019(W) ('Appeal 27'). Both appeals arose from the same dispute between the parties which was arbitrated upon. The position taken by the appellant at the commencement of the hearing before us was that our decision on Appeal 26 will determine the outcome of Appeal 27, whichever way Appeal 26 goes.

[2] Appeal 26 relates to the setting aside of the arbitration award whilst Appeal 27 is against the refusal by the High Court to register the award as a judgment. Having heard arguments by both parties, both written and oral, we reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

[3] The appellant had been granted leave to appeal on the following five questions of law, namely:

(1) Whether the threshold requirement stipulated by section 37 of the Arbitration Act 2005 to set aside an award as 'very low' as set out in the cases of *Petronas Penapisan* and *Sigur Ros Sdn Bhd v Master Mulia* is indeed the correct test in the light of the various other provisions of the Arbitration Act 2005?

(The question asks whether the threshold under section 37 of the Arbitration Act 2005 ('the Act') is 'very low')

(2) Whether the arbitrator who is an engineer who relies on his own knowledge of the construction industry in arriving at a decision on the quantum of 'loss of profit' pursuant to a provision recognised by section 21(3)(b) of the Arbitration Act 2005 for an arbitrator to be able to draw on its own knowledge and expertise, can then be said to be in breach of the rules of natural justice within the meaning of section 37(1)(b)(ii) read together with subsection 2(b) of the Act?

(The question asks whether an arbitrator who is an engineer and has knowledge of the construction industry could be in breach of the rules of natural justice by relying on such knowledge in arriving at his decision on the quantum of 'loss of profit')

(3) Whether the act of an Arbitrator relying on his own knowledge and expertise on matters of 'evidence' relating to an industry in which he is well acquainted will amount to a breach of natural justice within the meaning of section 37(1)(b)(ii) read together with subsection 2(b) of the Arbitration Act 2005?

(The question asks whether an arbitrator who is well acquainted with matters of evidence relating to the construction industry could be in breach of the rules of

natural justice by relying on such matters of evidence)

(4) Whether the precept of a breach of the rules of natural justice extends to the Arbitrator applying his own knowledge and expertise on an issue where the parties have led evidence on and which forms one of the very issues which the arbitral tribunal has to deal with, especially when the knowledge of the Arbitrator has an impact on the quality of evidence required for evaluation by the tribunal?

(The question asks whether an arbitrator who applies his own knowledge and expertise in the construction industry to a fact in issue can be in breach of the rules of natural justice)

(5) Whether the decision of the Arbitrator in making an award on what constitutes the value of completed works, and the basis on which such an assessment is to be made, can constitute a 'question of law arising out of the award'?

(The question asks whether the decision of an arbitrator on the value of completed works is a question of law)

[4] Questions 2, 3 and 4 are inter-related. Whichever way one looks at the questions, they invariably and ultimately lead to the question whether the arbitrator could, on matters of evidence relating to an industry in which he is well acquainted with, rely on his own knowledge and expertise in finding that 'in the Malaysian construction industry, it is almost a norm when asked to indicate a 'profit and attendance' for having to manage a nominated subcontractor, most contractors would include a margin of 10–15%' without giving the parties the opportunity to submit on the issue.

[5] Learned counsel for the appellant impressed upon us that the subject matter of the appeal relates to issues which concern players in the construction industry whose disputes are to be dealt with by way of arbitration. He said that practitioners in this area of dispute resolution including the various professions and arbitrators, professional arbitrators included, will be severely impacted by the decision of the Court of Appeal.

[6] More importantly, according to counsel, this court will examine the attitude of the courts in what is essentially a review jurisdiction but conferred essentially by statute, namely the Act, and that the arbitration, which is the genesis of the proceedings in court leading up to the present appeals, was a straightforward building contract claim that is ventilated and decided upon in arbitrations almost on a daily basis.

[7] It was submitted that the decision of the High Court and the Court of Appeal to interfere with the arbitration award offends the spirit of ss 8 and 36 of the Act and the principles of arbitral finality and minimal intervention which if not corrected will undermine the value of the arbitral process and cause litigants to run away from such alternative dispute resolution avenue.

[8] Section 8 of the Act enshrines the principle of minimal interference by the court, which is an ingrained aspect of the United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration: see *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 (CA) which was cited with approval by this court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1.

[9] This court in the recent case of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 made the following observations on the effect of ss 8–9, 37 and 42 of the Act:

> The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. *The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice*. (see: *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & another appeal* [2011] MLJU 1537; [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined. (Emphasis added.)

[10] The principle is trite that courts do not exercise appellate jurisdiction over arbitration awards: see *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113. The only provisions in the Act that provide for the setting aside of domestic awards are s 37(1) and s 42(1)–(4) of the Act (before its deletion).

[11] The factual matrix forming the background of the case is not in dispute. By letter of appointment dated 18 July 2011 the respondent appointed the appellant as its subcontractor for the construction and completion of vehicular box culverts and drainage works which formed part of the proposed Sungai Buaya Interchange and Toll Plaza which were contracted out to the respondent.

[12] The subcontract was for a lump sum price of RM9.5m for BOQ1 (preliminaries) and BOQ4 (drainage works) and a provisional sum of RM3.8m for BOQ11A and BOQ11B.

[13] The respondent purported to terminate the subcontract, which led to a dispute between the parties which in turn gave rise to claims for compensation and damages by the appellant and to counterclaims by the respondent. The termination was allegedly due to the delay of more than 20% financially as

stipulated by cl 12 of the subcontract, which reads:

> Iswarabena Sdn Bhd reserves the right to terminate this agreement by giving the Subcontractor fourteen (14) days prior written notice *if the works is delay (sic) more than 20% financially*.
>
> Thereafter, the Subcontractor shall have no further claims against Iswarabena Sdn Bhd as the Main Contractor, subject to the Subcontractor's right under the contract and tort. Notwithstanding above, should the Subcontractor withdraw from the services, the Subcontractor will no (sic) be entitled to payment for the work done and unless and except for reasons not occasioned by default of the Subcontractor, the Subcontractor shall be liable for all direct costs, losses and expenses incurred by Iswarabena Sdn Bhd as a result thereof including but not limited to the cost of selection and appointment of new consultant to provide the Services. (Emphasis added.)

[14] One of the appellant's claims was that the subcontract had been unlawfully terminated by the respondent. Its case was that it was prevented by the respondent from progressing with the works due to lack of site possession.

[15] The appellant referred the dispute to arbitration. By agreement of the parties, a professional engineer and chartered arbitrator in the person of Mr Chong Thaw Sing was appointed as the arbitrator. Oral hearings were held at the Kuala Lumpur Regional Centre for Arbitration at the conclusion of which the parties filed their respective written submissions as directed.

[16] On 11 January 2016, the learned arbitrator made and published his final award which effectively ruled as follows:

(a) the respondent's termination of the subcontract was unlawful; and

(b) the respondent to pay the appellant a net principal sum of RM2,351,264.27 made up of the following items:

  (i) the cost of the completed works amounting to RM1,409,154.75; and

  (ii) loss of profit amounting to RM942,109.52.

[17] There are three parts to the award: (1) a finding that the subcontract had been unlawfully terminated by the respondent; (2) a finding that works to the value of RM1,409,154.75 had been completed by the appellant; and (3) a finding that the appellant had incurred a loss of profit of RM942,109.52 resulting from the unlawful termination of the subcontract.

[18] The learned arbitrator awarded pre-award interest on the principal sum and costs of the reference (party and party costs) at RM50,000 as agreed between the parties. The cost of the award was taxed at RM119,250.

[19] The learned arbitrator proffered the following reasons for concluding that the termination of the subcontract by the respondent was wrongful:

(a) the respondent relied largely on verbal instructions to assert the delays to the subcontract but failed to rebut the appellant's contemporaneous records of non-availability of work area;

(b) the evidence from the main contract progress report that recorded delay to the drainage works of 7% at the end of March 2012 and 19% by 30 April 2012 militate against the delay of 52% computed by the respondent in the notice of intention to terminate dated 26 March 2012;

(c) the entire drainage work for the main contract was subcontracted by the respondent to the appellant, thus the progress of work reported in the main contract progress report was entirely that of the appellant's work; and

(d) the contention that the progress recorded in the main contract progress report was physical progress and not financial progress contradicted the respondent's own computation of financial progress of 26% as at 26 March 2012 as opposed to 28% at the end of March 2012 extracted from the records in the main contract progress report.

[20] The appellant applied to the High Court for enforcement of the award pursuant to s 38 of the Act whilst the respondent filed for setting aside or variation of the award pursuant to ss 37 and 42 on the following grounds:

(a) an application under s 37(1)(a)(v) and (2)(b)(ii) of the Act in that the arbitrator had breached the rules of natural justice and/or had exceeded his jurisdiction in his 'loss of profit' ruling; and

(b) an application under s 42 of the Act challenging all three rulings — the termination ruling, the loss of profit ruling and the value of completed works ruling — on the ground that the arbitrator had committed errors of law.

[21] After hearing arguments by the parties, the learned High Court judge delivered his decision on 22 November 2016 favouring the respondent. The arbitration award was varied pursuant to s 42 of the Act and the appellant's application to enforce the award under s 38 was dismissed.

[22] In a complete reversal of the learned arbitrator's finding, the learned judge found that the subcontract had been lawfully terminated by the respondent. The divergence of opinion between the learned arbitrator and the learned judge was over the calculation of the percentage of delay in financial terms at the time of termination.

[23] The learned judge's finding was that the learned arbitrator had erroneously applied physical progress delay instead of financial progress delay in finding that the threshold of 20% financial progress delay had not been reached. The view that the learned judge took was that the actual financial progress at the time of termination was either 9% or 11.37% only, well below the threshold of 20%.

[24] Accordingly, the learned judge set aside the award of loss of profit in the sum of RM942,109.52. However, despite holding that the subcontract had been lawfully terminated by the respondent, His Lordship did not disturb the arbitrator's assessment of the value of works already completed by the appellant amounting to RM1,409,154.75, which means he accepted that the sum had been correctly and lawfully awarded by the arbitrator.

[25] The learned judge expressly acknowledged that the reasons given by the learned arbitrator for making the award on the value of works completed were both 'sound and sensible' and that the court would not disturb it under the guise of a s 42 reference on a question of law.

[26] As for the respondent's application under s 37(1)(a)(v) and (2)(b)(ii) of the Act (breach of the rules of natural justice), the learned judge decided not to deal with the matter as he considered it to be academic. The High Court decision was therefore a decision that was made purely under s 42 of the Act.

[27] In essence, the grounds relied upon by the learned judge for varying the award under s 42 of the Act were as follows:

(a) the learned arbitrator had wrongly applied the contra preferentum rule in interpreting cl 12 of the subcontract;

(b) there was no basis for the learned arbitrator to conclude that the delay threshold of 20% financially had not been met as the quantities of works done as at the date of termination could not be disputed as the parties had conducted a joint measurement and had jointly signed a measurement sheet with agreed quantities;

(c) based on the agreed quantities, the actual financial progress as at 12 April 2012, ie the date of termination, was only 9% or that as pleaded by the respondent, ie 11.37% and that the learned arbitrator's finding that the actual financial progress was 28% when the termination occurred was in reference to physical progress instead of financial progress;

(d) the termination was lawful and there was no basis for awarding the appellant's loss of profit, which would only arise in case of wrongful termination; and

(e) on the issue of the value of the completed works, the question of what is

A fair and reasonable method of compensating the appellant for works done before the termination is a mixed question of law and fact. Therefore it does not fall within s 42 of the Act.

B **[28]** The appellant filed two appeals to the Court of Appeal against the decision, one against the variation of the arbitration award and the other against the dismissal of its application to enforce the award. The respondent on its part filed a cross-appeal, asking for a variation of the High Court order on the following broad grounds:

C (a) the arbitrator had assessed the value of the works completed on a wrong basis;

(b) the arbitrator misinterpreted the contract resulting in a wrongful evaluation of the works completed;

D (c) the arbitrator erred in awarding loss of profit on the basis of assumptions or perception without any evidence; and

(d) the arbitrator misunderstood and misapplied legal principles of assessment and award of damages.

E **[29]** The Court of Appeal agreed to the determination of the following four issues:

(a) whether the learned arbitrator had acted in breach of the rules of natural justice by relying on extraneous evidence 'thought up' by the learned arbitrator himself which was not tendered by the parties, not submitted upon and for which the parties were not given an opportunity to address and for which no evidence or allegation had been tendered and if so whether the whole award ought to be set aside (first issue);

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G (b) whether the subcontract was lawfully terminated (second issue);

(c) whether the learned arbitrator was entitled to make assumptions or to apply his own perception of industry standards on profit margin to award loss of profit in the absence of evidence adduced by the appellant on such loss and if the answer was in the negative, whether the learned arbitrator had committed an error of law (third issue); and

H

(d) whether the learned arbitrator had misconstrued cll 2 and 12 in the context of the contract to award the value of the completed works ruling based on physical progress at 28% and if yes, whether the learned arbitrator had committed an error of law (fourth issue).

I

[30] The appeals (including the cross-appeal) were heard together by the Court of Appeal on 1 March 2018. Its decision was delivered on 25 July 2018 whereby it was unanimously decided as follows:

(a) the findings of the High Court pursuant to s 42 of the Act were completely reversed and the appellant's appeal against the High Court order varying the award was dismissed in its entirety; and

(b) the respondent's cross-appeal for a variation of the High Court order was allowed.

[31] If the High Court had only set aside the award of loss of profit in the sum of RM942,109.52, the Court of Appeal dealt the appellant a further blow by setting aside the entire arbitration award to include setting aside the award for the value of works completed in the sum of RM1,409,154.75 which the High Court had decided not to disturb.

[32] The decision of the Court of Appeal was made both under ss 37 and 42 of the Act. Section 37 was invoked to rule on the first issue, ie breach of the rules of natural justice (which the High Court did not deal with) and s 42 on the value of works completed (which was awarded by the learned arbitrator and which the High Court did not disturb).

[33] By reversing the entire order of the High Court, the consequential effect of the Court of Appeal decision was that it also set aside the finding of the High Court that the termination of the subcontract was lawful, which effectively means that the finding of the arbitral tribunal that the subcontract had been unlawfully terminated was restored and is subsisting.

[34] We shall first deal with the arbitrator's loss of profit ruling, which comes within leave questions 2, 3 and 4, and which concerns a breach of the rules of natural justice. The basis for the respondent's challenge in the High Court was para 147 of the award, which the learned arbitrator expressed in the following terms:

> Similarly, I am not convinced that the Claimant's 25% margin or RM2,635,936.26 is fair and reasonable without taking into consideration the risks associated with that of a construction project, especially a civil engineering project is subjected to the vagaries of many unaccounted extraneous factors. But in the Malaysia construction industry, it is almost a norm when asked to indicate a 'profit and attendance' for having to manage a nominated subcontractor, most contractors would include a margin between 10–15%. In my view, it would not be unreasonable to presume these margins represent what an industry perceived as a safe 'no risk profit margin'. Further as lump sum contract assume higher risk than provisional quantities work, I am minded in this instant to award a margin for loss of profit for the remaining drainage (lump sum) work at 10% and the remaining vehicular box culvert (provisional quantities) work at 7.5%.

[35] The Court of Appeal dealt with the issue of breach of the rules of natural justice in the following manner:

A [37] We had the advantage of perusing all the evidence and submissions of parties filed before the learned arbitrator, and we are satisfied that the learned arbitrator's findings that under the Malaysian construction industry, there is a norm when asked to indicate a 'profit and attendance' for having to manage a nominated subcontractor, most contractors would include a margin of between 10–15%, were
B not supported by evidence, not contended by any party, neither were they raised in their submissions. Whereas the normal rate for a 'profit and attendance' for having to manage a nominated subcontractor is between 2%–4%. Furthermore, this is not a case of nominated subcontractor, but rather an appointed subcontractor. The learned Arbitrator rejected parties' submissions and position, and instead used his
C own computation at the rate of between 10%–15% by presuming that these margins are reasonable and represent what an industry perceived as a safe 'no risk profit margin'. This finding certainly in our considered opinion is perverse and prejudicial to the respondent, which amounts to a breach of the rules of natural justice.

D [38] We note that if there is a breach of the rules of natural justice, the discretion not to set aside the award is a very narrow one, and that too if the breaches are not material. In the present case before us, we are of the view that the *extraneous evidences* relied by the learned arbitrator were indeed relevant and material for his ruling on the loss of profit ruling. The evidence *invented by the learned arbitrator* was
E never indicated to the parties and without giving the parties an opportunity to respond as required by s 20 of the Act. This certainly would render the Award liable to be set aside under s 37(1)(a) of the Act (see *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617, *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd*. (Emphasis added.)

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[36] It is patently clear that the reason why the Court of Appeal found the arbitrator's loss of profit ruling to be perverse and in breach of the rules of natural justice was because the learned arbitrator had 'invented' extraneous evidence with a factual basis that was not tendered in evidence nor submitted
G by the parties, in breach of s 37(2)(b)(ii) of the Act in that the award contained decisions on matters beyond the scope of the submission to arbitration under s 37(1)(a)(v) of the Act.

[37] It was the Court of Appeal's finding that the respondent had been
H prejudiced by the arbitrator's failure to give it the opportunity to submit on the arbitrator's 'presumption' that the 10–15% profit margin for 'profit and attendance' ('P&A') was reasonable and represents what the industry considers as a safe 'no risk profit margin'.

I **[38]** Apparently the Court of Appeal accepted the respondent's computation of 2–4% profit margin as the normal rate for having to manage a nominated subcontractor, in preference to the arbitrator's computation of 10–15%. The Court of Appeal did not however make it clear why it accepted the respondent's computation of 2–4% as the correct computation.

[39] The Court of Appeal ruled that it was wrong for the learned judge to have ignored the breach of the rules of natural justice committed by the arbitrator in dealing with the issue of loss of profit. According to the Court of Appeal, there was a 'clear contravention' of s 20 of the Act. This finding can be found at paras 33 and 36 of the judgment:

> [33] We agree with the learned counsel for the respondent that the learned arbitrator had exceeded his jurisdiction and had breached the rules of natural justice in his ruling in the loss of profit ruling. What the learned arbitrator did was in a clear contravention with the provision under s 20 of the Act which provides that:
>
> > 20 The parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.
>
> ...
>
> [36] In the instant appeal, we agree with learned counsel for the respondent that there was clear contravention of s 20 of the Act committed by the learned arbitrator which amounts to a breach of the rules of natural justice. Yet, the learned presiding judge ignored it when he said:
>
> > [73] Having disposed of the question of law under the s 42 reference, there is no necessity to continue further with the s 37 application to set aside the whole of the award and indeed the issue raised in the s 37 application has become rather academic. It remains for this court to make the necessary directions and orders under s 43 of the Act. As I have held that the termination of the subcontract was lawful in answer to question 1 and 2 of the reference, I shall set aside that part of the Award at para 158 item 5 where the loss of profit claimed by the subcontractor is concerned.

[40] Having found that the learned arbitrator had breached the rules of natural justice, the Court of Appeal, in the same way that the High Court decided not to deal with the s 37 application, decided not to deal with the second issue for its determination, ie whether the subcontract had been lawfully terminated by the respondent, thus leaving the two conflicting findings of the learned arbitrator and the learned High Court judge on the issue unresolved.

[41] The contention by learned counsel for the respondent was that in the light of the Court of Appeal's finding that there was a clear contravention of s 20 of the Act which was prejudicial to the respondent, the Court of Appeal was right in exercising its discretion to set aside the entire award and that even if the threshold of s 37 of the Act is not 'very low', such higher threshold would still be satisfied in the circumstances of the case.

[42] The question that immediately comes to mind is whether the Court of Appeal was right in setting aside the loss of profit award (and indeed the entire award) without considering the question whether the subcontract had been

A lawfully terminated by the respondent. This is relevant in the whole scheme of things because the setting aside of the award of loss of profit by the High Court was a direct consequence of its finding that the subcontract had been lawfully terminated.

B **[43]** It was in consequence of such finding no doubt that the High Court found it to be baseless for the learned arbitrator to make the award, and not because the learned arbitrator had breached the rules of natural justice, which the learned judge did not deal with in any case.

C **[44]** The Court of Appeal completely ignored the issue of the legality of the termination of the subcontract as the focus of its attention was on the issue of breach of the rules of natural justice. This was despite the fact that the issue of the legality of the termination was raised by the appellant at the hearing, as evidenced by the appellant's written submissions which was produced before us
D and marked as Annexure one.

[45] If indeed the subcontract had been unlawfully terminated by the respondent as found by the learned arbitrator, the crucial question to ask is,
E what was the loss of profit occasioned to the appellant by reason of the wrongful termination of the subcontract?

[46] To recapitulate, the arbitral tribunal found the termination of the subcontract to be unlawful, the High Court found otherwise and the Court of
F Appeal ignored the issue, in the process failing to resolve the conflicting findings by the learned arbitrator and the learned High Court judge.

[47] Given the fact that the learned arbitrator and the learned High Court judge had arrived at diametrically opposite findings on the question whether
G the subcontract had been lawfully terminated by the respondent, and given the importance of the issue, it was incumbent on the Court of Appeal to resolve the issue one way or another. It was its duty to decide who was right — the arbitrator or the learned judge.

H **[48]** The Court of Appeal however brushed aside the issue as being 'unnecessary' (para 53 of the grounds of judgment), obviously on the ground that the failure by the arbitrator to give the respondent the right to submit on the profit margin issue alone was enough to set aside the entire award.

I **[49]** Having regard to the factual matrix of the case, with respect, we do not think the Court of Appeal took the correct approach. Clearly, the question whether the termination of the subcontract was lawful or otherwise is crucial in determining: (1) the legality of the award of loss of profit; and (2) the value of the works already completed which depended on the actual progress at the time

of termination, ie whether it was 9%, 11.37% or 28%.

[50] The appellant's contention was that the failure by the Court of Appeal to deal with the issue had caused substantial injustice to the appellant as the main plank of its appeal to the Court of Appeal was that the High Court was wrong in setting aside the arbitrator's finding that the termination of the subcontract was unlawful.

[51] It is to be noted that the allegation of a breach of the rules of natural justice was not an issue in relation to the legality of the termination of the subcontract. The issue was only raised in relation to the arbitrator's loss of profit ruling and it was not the respondent's case that the learned arbitrator had breached the rules of natural justice in ruling that the subcontract had been unlawfully terminated. In any event, there was no such challenge by the respondent before the Court of Appeal.

[52] For context and perhaps to better understand the learned arbitrator's decision vis a vis the decisions of the High Court and the Court of Appeal on the loss of profit ruling (from which the issue of breach of the rules of natural justice arose), it is necessary in our view to reproduce the entire length and breadth of paras 145–147 of the award:

> [145] The claimant has produced computations by way of substituting the BQ quantities, his anticipated costs to execute each of the items and arrive at a conclusion, had this subcontract not been terminated prematurely, he would have been able to make profit of RM2,471,599.79 or approximate margin of 18.5%. CW1 claimed that he found more savings from VBC2 that increased his profit to RM3,300,911.32 or a margin of approximately 25%. After he has set off the 28% of value of work done at termination, the loss of profit CW1 seeks to recover is RM2,635,936.26. A notable and crucial assumption that CW1 had made in arriving at his anticipated loss of profit of RM2,635,936.26 or a margin of 25% of his unwavered belief that the as-built quantities is lower than his priced BQ4. The net result of this anomaly in the BQ and drawings quantities is the 'saving' of costs for the work he deemed that he need not build but yet will have to be paid by the respondent under the lump sum contract. All these savings will by his reasoning contributed to the higher profit in this subcontract. These computations in Annexure 2, 3 and 4 are detailed attempts to work out a profit margin on paper with certain allowance given to wastages etc. I have no doubt that the claimant would be able to achieve the profit he thinks he should obtain if the subcontract is executed from the beginning to the end with clockwork precision in cost control for materials, resources and machinery. To achieve this, the world has to behave exactly the way the claimant think it should behave. No unforeseen events or external shocks that can throw his plan off balance should be allowed to occur. But in the real world such is not true, unforeseen world events ranging from climate change, oil price shock, forex market turmoil, geopolitical developments around all corners of the world impact our everyday lives and with it the costs of doing business. Otherwise, on paper there should not be any contractor in a construction contracts

that suffer losses, after all no reasonably competent contractor would undertake a project knowing full well at commencement that he will make a loss on paper. The question the Tribunal have to ask is, has the claimant proved his loss of profit in the legal sense of on the balance of probability? My answer is yes, but the Tribunal is unconvinced the amount sought is fair and reasonable figure. By not allowing for contingencies such as potential delays by the claimant, inclement weather, LAD, spike in materials and manpower costs, shortage of materials and manpower, or simply mismanagement of the project, the claimant is seeking to recover risk free profit. In *Tan Sri Khoo Teck Puat*, the Federal Court urged the court assessing damages to take all contingencies foreseeable into consideration, this advice is similarly applicable to this Tribunal. However, I should not penalise the claimant for not having considered these contingent facts in its prayer for loss of profit as he obviously does not have a crystal ball to look into what holds for the future. At the same time the Tribunal cannot be fait accomplice to the claimant's windfall to award this amount sought.

[146] The respondent urges this Tribunal to award only nominal damages if it finds the respondent liable to compensate the claimant for loss of profit. Because that is what the law says in popular industries if the quantum has not been proven and the claimant has failed to prove its loss. Nominal damages according to past Malaysian judicial precedents can range from RM10 to RM2,000. For example in *Hilbourne v Tan Tiang Quee* [1972] 2 MLJ 94 the High Court awarded the plaintiff substantial damages for loss of opportunity to purchase a piece of land. On appeal the Court of Appeal reduced the damages to nominal damages of RM10 primarily because the plaintiff did not suffer any pecuniary loss. In *Industrial and Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433; [1993] 2 AMR 2275 in relation to a plaintiff's claim for depreciation of an excavator because the defendant had used it for more than two-months period. The High Court awarded RM100 as the plaintiff could not prove the depreciation. Similarly, in *Bee Wah Plastic Factory Sdn Bhd v Francis Soh Kai Shuen (b/s Shatin Marketing & General Agencies)* [1997] 4 MLJ 545 the appellant's breach of contract to supply bottles was proven but the defendant could not bring sufficient proof of loss of profit, the High Court reduced the magistrate court's award of RM20,982 to RM2,000 as a fair and nominal damages. Again in *Letrik Bandar Hup Seng Sdn Bhd v Wong Sai Hong* [2002] 5 MLJ 247 the sessions court's award of RM27,217.86 was set aside and replaced with a nominal damages of RM10. Finally, in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd*, the Federal Court reduced a substantial, RM13,500,000 loss of profit award by the High Court to a nominal damages of RM10. The Federal Court's decision emphasised the importance of the court to take into consideration all contingencies if possible before making the award of damages including loss of profit. In this particular case the respondent aggrieved party who had sought and was awarded RM13,500,000 loss of profit had earlier purchased the land at RM48m and the same piece of land had subsequently appreciated in value to RM119,560,000. Because of the appellant's breach of contract to purchase the land, the respondent gets to keep the land and make substantial gain which otherwise would have belonged to the appellant. It is obvious the Federal Court refused to be fait accomplice to the prospect of double gains by the respondent if the loss of profit and appreciation in land value are allowed to stand.

> [147] Based on the facts of this case, I am not persuaded the situation is anywhere close to the above cited cases to merit this Tribunal award of a nominal damages. Similarly, I am not convinced that the claimant's 25% margin or RM2,635,936.26 is fair and reasonable without taking into consideration the risks associated with that of a construction project, especially a civil engineering project is subjected to the vagaries of many unaccounted extraneous factors. *But in the Malaysian construction industry, it is almost a norm when asked to indicate a 'profit and attendance' for having to manage a nominated subcontractor, most contractors would include a margin of 10–15%. In my view, it would not be unreasonable to presume these margins represent what an industry perceived as a safe 'no risk profit margin'*. Further as lump sum contract assume higher risk than provisional quantities work, I am minded in this instant to award a margin for loss of profit for the remaining drainage (lump sum) work at 10% and the remaining vehicular box culvert (provisional quantities) work at 7.5%. (Emphasis added.)

[53] The exact expression that the arbitrator used when he spoke of the 10–15% no risk profit margin was 'almost a norm' and not 'there is a norm' which the Court of Appeal seems to have assumed he had said. And the arbitrator was referring to 'most contractors' and not 'all contractors'.

[54] Having asked himself the right question, ie 'has the Claimant proved his loss of profit in the legal sense of on the balance of probability?', the learned arbitrator went on, based on the material before him, to make a firm finding of fact that the appellant had proved its loss of profit except that the sum claimed was neither fair nor reasonable, hence his decision to award a lower figure but without acceding to the respondent's contention that the appellant was only entitled to nominal damages.

[55] Learned counsel for the appellant referred us to *McGregor on Damages* (16th Ed, 1997) where at para 358 the learned authors deals with the problem of certainty in assessing damages in the following terms:

> On the other hand, where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams LJ put it in *Chaplin v Hicks*, the leading case on the issue of certainty: 'The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.' Indeed if absolute certainty were required as to the precise amount of loss that the plaintiff had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss. Of course, as Devlin J said in *Biggin v Permanite*: 'Where precise evidence is obtainable, the court naturally expects to have it, [but] where it is not, the court must do the best it can'. Generally, therefore, although it remains true to say that 'difficulty of proof does not dispense with the necessity of proof', the standard demanded can seldom be that of certainty. Even if it is said that the damage must be proved with reasonable certainty, the word 'reasonable' is really the controlling one, and the standard of proof only

demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount. The clearest statement of the position is that of Bowen LJ in *Ratcliffe v Evans* where he said:

> In all actions accordingly on the case where the damage actually done is the gist of action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularly with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

It is important to consider in some detail the question of what the courts will accept as reasonable certainty that an alleged loss has occurred or will occur. Cases in which absolute certainty is possible, and in which precise evidence is therefore expected by the court, do not need treatment here. These are cases such as where the plaintiff claims for loss of earnings or expenses already incurred, i.e. between the time of accrual of the action and the time of trial, or where the claim is for the difference between the contract price and a clear and undoubted market price. What does require consideration are the principal categories of case where substantial damages may be awarded although the nature of the damage prevents absolute certainty of proof.

[56] In *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd 'The MV Pamphilos'* [2002] All ER (D) 94 (Nov); [2002] Vol 2 681, Colman J in dealing with an application under s 68 of the English Arbitration Act 1996 had this to say:

> Applications under s 68 of the Arbitration Act 1996 to set aside or remit an award on the ground of serious irregularity affecting the proceedings or the award involve a two stage investigation: first, asking whether there has been an irregularity of at least one of the nine kinds identified in s 68(2)(a) to (i), and secondly, asking whether the incidence of such irregularity has caused or will cause substantial injustice. With respect to the first stage, it has to be emphasized that the duty to act fairly is quite distinct from the autonomous power of the arbitrators to make findings of fact. Thus, whereas it would normally be contrary to the arbitrator's duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, *it will not usually be necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which the arbitrators intend to draw, even if such inferences may not have been previously anticipated in the course of the arbitration*. Particularly where there are complex factual issues it could often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary fact which have been in issue. In such a case the tribunal does not have to refer back its evidential analysis for further submissions. A typical situation is where arbitrators arrive at a conclusion on an issue of expert evidence which differs to some extent from that put forward by either opposing expert. *In many cases, arbitrators are*

appointed because of their professional legal, commercial or technical experience and the parties take the risk that, in spite of that expertise, errors of fact might be made or invalid inferences drawn without prior warning. It has to be emphasized that in such cases there is simply no irregularity, serious or otherwise. (Emphasis added.)

[57] The passages in bold are especially relevant in the context of the present case as the arbitrator Mr Chong Thaw Sing was appointed not as a lay arbitrator but due to his knowledge and technical expertise as a professional engineer, bearing in mind his appointment was to resolve building construction issues between the parties. Therefore, in the words of Colman J in *Bulfracht*, there is 'simply no irregularity, serious or otherwise' if he had made erroneous findings of fact or invalid inferences without prior warning.

[58] But the more important question is whether there is anything in the loss of profit award that exhibits any hint or trace of inequality of treatment between the parties by the learned arbitrator, in breach of s 20 of the Act. In this regard, we note first of all, that the parties had deliberately chosen not to adduce evidence of industry practice on P&A, which according to learned counsel for the appellant was a 'strategy' that the parties themselves adopted. This assertion was not challenged or disputed by learned counsel for the respondent.

[59] Further, neither party was shut out or prevented in any way from adducing such evidence, if they had so wished. For this reason it was contended by learned counsel for the appellant that the parties had been treated equally and that the Court of Appeal was wrong in finding that the arbitrator had breached s 20 of the Act by not giving the parties the opportunity to submit on the issue of profit margin in respect of which the learned arbitrator had made a determination based on his own knowledge and expertise pursuant to s 21(3)(b) of the Act.

[60] The appellant's claim, it will be recalled, was for loss of profit of RM2,635,936.26 which amounted to 25% of the remaining works. Its witness had testified that he had included a margin of 15% in the project budget. The respondent's position on the other hand was rather straightforward. Its case was that the appellant's computation ought to be rejected outright and that the appellant was only entitled, if at all, to nominal damages.

[61] As can be seen from the loss of profit award, the learned arbitrator was prepared to rule that the appellant had successfully made out its case for a 25% profit but because of the contingencies, he reduced it to 10% and 7.5% respectively. He rejected the respondent's argument that only nominal damages ought to be awarded to the appellant.

[62] In awarding a loss of profit of 10% for the remaining drainage works and 7.5% for the remaining vehicular box culvert, the arbitrator was in fact moderating the appellant's claim of 25% by reducing it for contingencies, albeit taking the 10–15% margin for P&A which he described as 'almost the norm' in the Malaysian construction industry.

[63] Obviously, what the learned arbitrator did was to strike a balance between the high and the low of the quantum for loss of profit. He did not slavishly apply the 10–15% 'norm' but only allowed for a lower range. We agree with learned counsel for the appellant that this is what arbitrators are expected to do.

[64] What is also clear from the award is that in determining the quantum of loss of profit, the learned arbitrator found the respondent's evidence to be of little value but at the same time he considered the quantum claimed by the appellant to be excessive. That was the reason why, as we just mentioned, he brought the appellant's claim down from 25% to 10% for loss of profit for the remaining drainage works and 7.5% for the remaining vehicular box culvert (provisional quantities) works.

[65] Given the state of the evidence and the stand taken by the respective parties, it is clear to us that the learned arbitrator did not in any way redefine the case submitted for arbitration when basing his loss of profit ruling on the 10–15% 'almost norm' in the Malaysian construction industry. It therefore comes as no surprise to us that the learned High Court judge did not delve into the issue of breach of the rules of natural justice under s 37 of the Act but instead decided the case solely on s 42.

[66] But herein lies the bone of the respondent's contention, that the arbitrator's award of loss of profit is perverse on the ground that it is unrelated to evidence but drawn entirely from the arbitrator's own knowledge and expertise as a professional engineer. It was submitted that in the absence of 'evidence' that the 10–15% no risk profit margin for P&A is the norm in the Malaysian construction industry, it was wrong for the arbitrator to have awarded an 'arbitrary' figure of RM942,109.52 for loss of profit.

[67] This, according to learned counsel for the respondent, was in clear breach of s 37(1)(a)(v) read with s 37(1)(b)(ii) of the Act. Reliance was placed on the following authorities for the proposition that the arbitrator had a duty to inform the parties of his reliance on his own knowledge: (1) *Handley v Nationwide Anglia Building Society* [1992] 2 EGLR 113 (HC, UK) Gatehouse J; (2) *Guardcliffe Properties Ltd v City & St James* [2003] 2 EGLR 16 (HC) Etherton J; and (3) *Xerox Canada Ltd v MPI Technologies Inc* [2006] OJ No 4895 (CL Campbell J) (Superior Court, Ontario).

[68] If we were to accede to learned counsel's contention, the implication is that the loss of profit ruling made by the arbitrator is perverse as there was no 'evidence' before the arbitral tribunal of the 10–15% P&A 'norm' that the learned arbitrator applied in determining the quantum of profit loss.

[69] For ease of reference, we reproduce below s 37(1)(a)(v) and (1)(b)(ii) of the Act:

> 37(1) An award may be set aside by the High Court only if —
>
> (a) the party making the application provides proof that —
>
> ...
>
> (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;
>
> ...
>
> (b) the High Court finds that —
>
> ...
>
> (ii) the award is in conflict with the public policy of Malaysia.

[70] Section 37(3) of the Act which s 37(1)(a)(v) is subject to reads as follows:

> (3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[71] There is no ambiguity in s 37(3). It means only that part of the award which contains decisions on matters not submitted to arbitration may be set aside. But what the Court of Appeal did in the present case was to set aside the entire arbitration award and order of the High Court, including the award for the value of works completed in the sum of RM1,409,154.75 even though the breach of the rules of natural justice complained of by the respondent was only in respect of the loss of profit ruling.

[72] The view that the Court of Appeal took was that 'if there is a breach of the rules of natural justice, the discretion not to set aside the Award is a very narrow one, and that too if the breaches are not material'. The Court of Appeal considered the failure by the learned arbitrator to give the parties the opportunity to submit on the 'norm' in his loss of profit ruling as very material and had prejudiced the respondent. But it failed to address its mind to the question whether or not the award for the value of works completed in the sum of RM1,409,154.75 should also be set aside, given that the power to set aside conferred by s 37(3) of the Act is only in respect of 'that part of the award which

A contains decisions on matters not submitted to arbitration'. Here, the award for the value of works completed was on a matter that was submitted to arbitration and which the High Court had affirmed.

B **[73]** The payload behind leave questions 2, 3 and 4 is whether, when the arbitrator drew on his own knowledge and expertise on the loss of profit margin of 10–15% for P&A, he was obliged to inform the parties of such reliance and to provide the parties the opportunity to address him on the issue, failing which he would be in breach of the rules of natural justice under s 20 of the Act.

C

[74] The main thrust of the respondent's argument was this: the issue before the Court of Appeal was not whether the arbitrator could draw on his own knowledge and expertise as it was conceded that the arbitrator was allowed to do so by s 21(3)(b) of the Act. In counsel's own words 'It is not the
D Respondent's case that the Arbitrator cannot draw on his own knowledge and expertise. This was not an issue at all before the Court of Appeal'. (para 38 of the respondent's written submissions). Rather, from the respondent's standpoint, the issue was whether the arbitrator had breached the rules of natural justice when he based his loss of profit ruling on 'extraneous evidence'
E not tendered and submitted by the parties.

[75] We were referred by learned counsel to the following para 32 of the Court of Appeal's grounds of judgment to support his argument that the Court of Appeal had correctly identified the issue:

F

> Learned counsel for the respondent's main complaint in relation to this issue was that the learned arbitrator had arrived at the loss of profit ruling based on extraneous evidence with a factual basis which was not tendered or submitted by the parties. Both parties were not even given a chance to address the learned arbitrator on the
G same extraneous evidence. Without consulting the parties, the learned arbitrator proceeded on his own and unilaterally introduced the so called 'no risk profit margin' of 10–15% for profit and attendance. This had caused prejudice to the parties.

H **[76]** Section 21 of the Act is key to the issue. The provision in its entirety provides as follows:

> 21(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings.
>
I (2) Where the parties fail to agree under subsection (1), the tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate.
>
> (3) The power conferred upon the arbitral tribunal under subsection (2) shall include the power to —

(a) determine the admissibility, relevance, materiality and weight of any evidence;

(b) draw on its own knowledge and expertise;

(c) order the provision of further particulars in a statement of claim or statement of defence;

(d) order the giving of security for costs;

(e) fix and amend time limits within which various steps in the arbitral proceedings must be completed;

(f) order the discovery and production of documents or materials within the possession or power of a party;

(g) order the interrogatories to be answered;

(h) order that any evidence be given on oath or affirmation; and

(i) make such other orders as the arbitral tribunal considers appropriate.

[77] The procedure under s 21 is this. Subject to the provisions of the Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration proceedings but where the parties fail to reach an agreement, the tribunal may conduct the arbitration in such manner 'as it considers appropriate', and this includes, amongst others, the power to 'draw on its own knowledge and expertise', which expression must be a reference to the arbitrator's own knowledge and expertise on any fact relevant to the issue.

[78] It is important to appreciate that a determination under s 21(3)(b) is one of fact and not of law. In form and spirit, the provision clearly allows the arbitral tribunal to draw on its own knowledge and expertise on any fact in issue which it is acquainted with. What the respondent was suggesting in effect was that there must be actual 'evidence' before the arbitral tribunal before it could draw on its own expertise and knowledge in arriving at such finding of fact.

[79] It must also be appreciated that the power vested in the arbitral tribunal by s 21(3)(b) to 'draw on its own knowledge and expertise' is a power that is conferred by statute and not a power that is derived from some common law principles. But of course common law authorities where relevant provide useful guidance in interpreting the provision.

[80] It has been held that there is a difference between a 'lay arbitrator' and an arbitrator with certain expertise and experience in a particular field: see *Mediterranean and Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd* [1948] 2 All ER 186 where Lord Goddard CJ drew the distinction:

> The more serious question that was argued was that neither side had tendered evidence with regard to damage and, therefore, the arbitrator had no material before him on which he could fix the amount which the sellers were entitled to receive. This would be a formidable, and, indeed, fatal objection in some arbitrations. If, for instance, a lawyer was called on to act as arbitrator on a commercial contract he would not be entitled, unless the terms of the submission clearly gave him power to so do, to come to a conclusion as to the amount of damages that should be paid without having evidence before him as to the rise or fall of the market, as the case may be, or as to other facts enabling him to apply the correct measure of damage, but, in my opinion, the case is different where the parties select an arbitrator, or agree to arbitrate under the rules of a chamber of commerce under which the arbitrator is appointed for them, and *the arbitrator is chosen or appointed because of his knowledge and experience of the trade. There can be no doubt that with regard to questions of quality and matters of that description an arbitrator of this character can always act on his own knowledge*. (Emphasis added.)

[81] Fisher J in *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 (HC) spoke in similar vein when he said that as a general principle and in the absence of agreement to the contrary, lay arbitrators must confine their fact finding to the information provided by the parties, but when it comes to arbitrators who have been chosen for their expertise in the subject-matter of the dispute, different consideration applies in that even without express agreement on the subject, it is presumed that such arbitrators can draw on their own knowledge and experience for general facts, that is to say facts which form part of the general body of knowledge within their area of expertise as distinct from facts that are specific to the particular dispute. Reference was made to *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14.

[82] In cases where an arbitrator is appointed for his or her special knowledge and skill or expertise, such arbitrator is entitled to draw those sources for the purpose of determining the dispute and need not advise the parties that he or she is doing so: see *Mediterranean and Eastern Export Co* and *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84.

[83] Lord Denning in *Fox and others v P G Wellfair Ltd; Fisher and another v P G Wellfair Ltd* [1982] 2 EGLR 11:

> There are some arbitrations in which the arbitrator is expected to form his own opinion and act on his own knowledge without recourse to evidence given by witnesses on either side: such as an arbitrator who is to decide as to whether goods are up to sample; see *Mediterranean & Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd* (1948) 64 TLR 337. But there are other arbitrations in which the arbitrator is expected to receive the evidence of witnesses and the submissions of advocates and to be guided by them in reaching his conclusion: such as arbitrations on shipping contracts or on building contracts. In such cases the arbitrator is often selected because of his knowledge of the trade — so that he can follow the evidence

and submissions. But he must act judicially. He must not receive evidence in the absence of the other party, and so forth. A

[84] The learned judge went on to say that an arbitrator:

can and should use his special knowledge so as to understand the evidence that is given — letters that have passed — usage of the trade — the dealings in the market — and to appreciate the worth of all that he sees upon a view. But he cannot use his special knowledge — or at any rate he should not use it — so as to provide evidence on behalf of the defendants which they have chosen not to provide for themselves. For then he would be discarding the role of an impartial arbitrator and assuming the role of advocate for the defaulting side. At any rate he should not use his own knowledge to derogate from the evidence of the plaintiff's experts — without putting his own knowledge to them and giving them a chance of answering it and showing that his own view is wrong. B C

[85] Lord Denning in the above passage was of course speaking of the need for the arbitrator to be impartial and not to assume the role of advocate for the 'defaulting side' (who in that case was unrepresented). What the learned arbitrator in the present case did was precisely what Lord Denning had in mind, ie to use his special knowledge 'so as to understand the evidence that is given — letters that have passed — usage of the trade — the dealings in the market — and to appreciate the worth of all that he sees upon a view'. D E

[86] In *Fortress Fabrics* Lord Goddard CJ endorsed the following observations by Branson J in *Jordeson & Co v Stora Koppabergs Bergslags Akt* (1931) 41 Ll L Rep 201: F

Now, I think that the fact that this umpire was an expert in the timber trade and was appointed because he was such an expert must not be lost sight of. I think the parties must be taken to have assented to his using the knowledge which they chose him for possessing; I do not mean to say knowledge of special facts relating to a special or particular case, but that general knowledge of the timber trade which a man in his position would be bound to acquire. G

[87] Dunn LJ in his judgment in *Fox and others* explained the difference between general knowledge and special knowledge as follows: H

... it seems to me that an expert arbitrator should not give evidence to himself without disclosing the evidence on which he relies to the parties, or if only one, to that party. He should not act on his private opinion without disclosing it. It is undoubtedly true that an expert arbitrator can use his own expert knowledge. But a distinction is made in cases between general expert knowledge and knowledge of special facts relevant to the particular case. I

[88] The following illustration was given by the learned judge to explain the difference:

> An arbitrator is required to value a bull killed by the negligence of one of the parties. If the expert arbitrator relies on his general knowledge of the value of bulls, including fluctuations in the market known to anyone who studies the market, there is no need to disclose it. But if he has recently sold an identical bull for a certain sum, it is necessary to disclose that to the parties. Or if the dead bull is found by the arbitrator, unknown to the parties, to be suffering from some disease or injury which reduces its value, it is necessary to disclose that fact to the parties. So in assessing rents, an expert arbitrator can rely on his general knowledge of comparable rents in the district. But if he knows of a particular comparable case, then he should disclose details of it before relying on it for his award.

[89] The demarcation of what is general and what is special knowledge is not always easy to draw. This is how Ward LJ expressed the difficulty in *Strathclyde Pension Fund*:

> It will not always be easy to determine when special facts relating to a special or particular case become subsumed within the general knowledge that a busy and experienced expert is bound to acquire. The best I can do to provide an acceptable test is to reformulate the question in this way: is the information upon which the arbitrator has relied information of the kind and within the range of knowledge one would reasonably expect the arbitrator to have acquired … If he uses knowledge of that kind he acts fairly; if he draws on knowledge outside that field, then the rule is quite clear.

[90] There is no dispute that the arbitrator in the present case was not a lay arbitrator. He was a professional engineer by profession, a chartered arbitrator and a Fellow of the Chartered Institute of Arbitrators (FCIArb). There was no argument raised at any stage of the proceedings, including before us, that he did not have the requisite special knowledge and expertise to entitle him to make the pronouncement that 'in the Malaysian construction industry, it is almost a norm when asked to indicate a 'profit and attendance' for having to manage a nominated subcontractor, most contractors would include a margin of 10–15%'.

[91] Clearly, the norm that the learned arbitrator was speaking of related to general facts, 'that is to say facts which form part of the general body of knowledge within their area of expertise as distinct from facts that are specific to the particular dispute' (*Methanex Motunui Ltd*). The learned arbitrator was therefore competent to draw on his own knowledge and expertise on the existence of the 10–15% no profit risk norm in the Malaysian construction industry without giving the parties the opportunity of answering it and showing that his view was wrong (*Jordeson & Co*).

[92] The power of arbitrators to draw on their own knowledge and expertise in appropriate cases is essential to arbitration in very many cases: *Fox and others*.

[93] The question is how far can the arbitrator rely on or is entitled to draw on his own knowledge and expertise in the conduct of the arbitral proceedings. There is a dearth of local authority on this point. In *Sigur Ros*, a case that essentially turned on s 37(1)(b)(ii) of the Act, ie an award that is in conflict with the public policy of Malaysia, the Court of Appeal made the following observations:

> Although the arbitrator had power to draw from his own knowledge and expertise — and this was provided for in s 21(3) of the AA — this power had to be read together with the arbitrator's overarching duty to act fairly and in accordance with the rules of natural justice as set out in s 20 of the AA. The arbitrator's duty to act fairly and to always afford parties reasonable opportunity to present their case or arguments on any live issue to protect the sanctity and finality of the award and for sound business and commercial practice.

[94] The Court of Appeal relied on two cases from New Zealand, namely *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 and *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644 as the law in New Zealand is similar to ours in respect of setting aside applications under s 37 of the Act with r 34(2)(b)(ii) read with r 34(6)(b)(i) and (6)(b)(ii) of Schedule 1 to the Arbitration Act 1996 of New Zealand ('the New Zealand Act').

[95] Section 21(3)(b) of the Act is also similar to s 3(1)(b) of the New Zealand Act. *Rotoaira* laid down ten principles to be applied in cases of setting aside an award for breach of the rules of natural justice alleging lack of opportunity to be heard on the arbitrator's knowledge and expertise, as follows:

(a) arbitrators must observe the requirements of natural justice and treat each party equally;

(b) the detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise;

(c) as a minimum each party must be given a full opportunity to present its case;

(d) in the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument;

(e) in the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond;

(f) the last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing;

(g) on the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented;

(h) nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself;

(i) it follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result; and

(j) once it is shown that there was significant surprise it will be reasonable to assume procedural prejudice in the absence of indications to the contrary.

[96] As noted by the Court of Appeal in *Sigur Ros*, Fisher J in applying the above principles objectively to the facts of the case, came to the following conclusion:

> I do not think that in those circumstances the trust can complain that an award adopting a land expectation value contributions model was not reasonably foreseeable. As a potential outcome it fell squarely within the lease, the reference and the pleadings. Given the gap between the 75 per cent sought by the trust and the 12.6 per cent proposed by the Crown, it was always predictable that the arbitrators would arrive at a more moderate position between the two … In a matter of this kind the Court is not asked to decide whether it would have chosen the values which the arbitrators inserted into their model. The question is whether the arbitrators had before them evidence from which they could have drawn their conclusions … It could not be suggested that land expectation value, and the factors to be adopted when using it, were central themes in the arbitration but they certainly figured among the live issues. The test is not what the trust in fact expected. It is what the reasonable litigant in the trust's place would have expected. Viewed objectively, the

award model was a reasonably foreseeable outcome and there was sufficient evidentiary foundation for the values inserted into it. A

[97] What is noticeable in both *Rotoaira* and *Methanex Motunui* is that in the exercise of the power to draw on one's own knowledge and expertise, the two elements are: (1) 'reasonable foreseeability' and (2) 'surprise'. These are the two crucial elements in determining the boundaries of the exercise of that power. B

[98] In *Rotoaira*, the arbitrator rejected both the parties' methods of calculating the percentage of the stumpage. Instead he applied his own methodology of computation beyond what the parties submitted. The court did not find the arbitrator to be in breach of the rules of natural justice just because he failed to give the parties the opportunity to deal with the approach taken by him. C D

[99] In the context of the present case, we do not think that the drawing by the arbitrator on his own knowledge and expertise of the 10–15% no risk profit margin for P&A as being 'almost a norm' in the Malaysian construction industry was something that was not reasonably foreseeable or was a significant surprise to the respondent, so much so that the failure by the learned arbitrator to give it the opportunity to submit on the issue had resulted in a serious breach of the rules of natural justice. While it is true that the arbitrator was not expected to know everything about the norms in the Malaysian construction industry, neither is he expected to know nothing at all. E F

[100] To the argument that actual evidence (in this case evidence of the 10–15% no risk profit margin for P&A) must be produced before the arbitral tribunal before it could draw on its own knowledge and expertise under s 21(3)(b), we can only say that such argument has a tendency to defeat the object behind the provision rather than to put its object into effect and must be rejected. G

[101] The construction if accepted will render the provision completely otiose and denuded of all meaning, contrary to the trite principle that Parliament does not legislate in vain. Heed must be taken of s 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes. H

[102] Effect must therefore be given to s 21(3)(b) of the Act in order to follow through with Parliament's intention to allow the arbitral tribunal to draw on its 'own knowledge and expertise'. Actual evidence is the very antithesis of a person's own knowledge and expertise. Unless it can be shown that the arbitrator's own knowledge and expertise on any fact in issue is plainly I

A and unarguably wrong, the court must be very slow to interfere with his findings.

[103] Learned counsel for the respondent submitted that the arbitrator's finding that a P&A of 10–15% is 'almost a norm' in the Malaysian construction industry is both 'unsubstantiated and incorrect'. He referred us to the following authorities:

B

(a) *Mancon Bhd v Wembley Construction Sdn Bhd & Anor* [1997] MLJU 23; [1997] 1 LNS 294 (HC) where Kamalanathan JC (as he then was) fixed the nominated subcontractor's P&A at 4% of the total gross final contract value;

C

(b) *Lec Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339 (CA) where Mokhtar Sidin JCA delivering the judgment of the court fixed the main contractor's P&A in respect of the NSC at 3% of the subcontract price; and

D

(c) *Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2010] MLJU 311; [2010] 1 LNS 279 (HC) where Amelia Tee Hong Geok Abdullah JC (as she then was) ruled that the main contractor's P&A in respect of the NSC was 1% of the subcontract price.

E

[104] According to learned counsel, he could not find any report of any P&A that came close to the 10–15% that the arbitrator said was 'almost a norm' in the Malaysian construction industry. With due respect, the cases cited by learned counsel provide no authority for saying that the learned arbitrator was plainly and unarguably wrong in using the 10–15% no risk profit margin for P&A as a basis for his ruling on loss of profit.

F

G

[105] It was further argued that the basis for the 10–15% no risk profit margin for P&A as determined by the arbitrator was inconsistent with the appellant's pleaded case. It was pointed out that the appellant's pleaded claim for loss of profit was not premised on the 'no risk profit margin' of 10–15% 'as thought up by the Arbitrator' but was premised on an entirely different basis, namely the alleged savings to be made from the over-provision of quantities in the BQ.

H

I

[106] With due respect to learned counsel, we are not persuaded by the argument. As we have pointed out earlier in this judgment, the learned arbitrator on the evidence before him was prepared to rule that the appellant had successfully made out its case for a 25% profit but because of the contingencies, he reduced it to 10% and 7.5% respectively.

[107] We must not lose sight of the reality that quantification of loss of profit is not an exact science and is the arbitrator's remit. As Lord Mustill observed in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, what fairness requires in any particular case is 'essentially an intuitive judgment'. Admittedly it was spoken in a different context but there is no reason why it does not apply for the purposes of determining loss of profit.

[108] Given the evidence before the arbitral tribunal, the question of the arbitrator having relied on 'extraneous evidence' which he 'invented' or 'thought up' of the 10–15% no risk profit norm for P&A in the Malaysian construction industry as alleged by the respondent does not arise at all. As such, the question of the arbitrator having breached the rules of natural justice by failing to give the parties the opportunity to submit on the norm also does not arise.

[109] Even if the learned arbitrator was wrong in not giving the parties the opportunity to submit on the 10–15% no risk profit norm for P&A, we do not consider the breach to be of such gravity and materiality that the respondent can be said to have been denied due process under s 20 of the Act. It would not in our view have affected the outcome of the learned arbitrator's decision on the loss of profit award.

[110] It is clear to us that the arbitrator's loss of profit ruling was based on evidence before him and the inferences to be drawn therefrom. Both courts below were therefore wrong in setting aside the loss of profit award, either under s 37 or under s 42 of the Act or under both ss 37 and 42.

[111] At the risk of being repetitive, we must emphasise the point that the setting aside of the award of loss of profit by the High Court was a direct consequence of the learned judge's finding that the subcontract had been lawfully terminated, contrary to the learned arbitrator's finding that the subcontract had been unlawfully terminated. We shall explain later in this judgment why we say that the learned arbitrator was right in finding that the subcontract had been wrongfully terminated.

[112] That concludes our determination on the loss of profit ruling. We now come to the decision of the Court of Appeal in setting aside the award for the value of works completed which amounted to RM1,409,154.75. This comes within leave question 5, which is: 'Whether the decision of the Arbitrator in making an award on what constitutes the value of completed works, and the basis on which such an assessment is to be made, can constitute a 'question of law arising out of the award'?

[113] The question relates to the award for the drainage works which was

awarded at 28% of RM9,464 (lump portion of the drainage subcontract) or RM2,590,19.92. The arbitrator decided that the compensation for the drainage works was based on the actual financial progress, which he determined to be 28% at the time of the termination.

[114] The learned High Court judge acknowledged that the arbitrator's determination of the lawfulness of the respondent's termination of the subcontract was a finding of fact but went on to say that the arbitrator's finding of fact was based on a disparity in the physical progress of 20% instead of financial progress, meaning to say the arbitrator had mistaken physical progress for financial progress. This alleged error of fact on the part of the learned arbitrator weighed heavily in the learned judge's mind in holding that the arbitrator had erred in finding that the subcontract had been unlawfully terminated.

[115] The reason why the learned judge decided to uphold the award for the value of works completed despite holding that the subcontract had been lawfully terminated by the respondent was because he was of the view that the question of law framed by the respondent, ie 'Whether the Learned Arbitrator has misconstrued Clauses 2 and 12 in the context of the Contract to award costs of completed works based on the percentage of 28%' was a mixture of fact and law, hence beyond the purview of s 42 of the Act. He said, rightly in our view, that the court would not disturb it under the guise of a s 42 reference on a question of law.

[116] The Court of Appeal had a different view. Its view was that the question should have been answered in the affirmative for the following reason:

> The fact that there were two methods of calculation based on both parties submissions does not necessarily mean that there is a possible range of answer from applying the law to the facts as per the view of the learned presiding judge.

[117] The Court of Appeal then went on to rule that 'there will be only one conclusion that the percentage of works done as at the time of termination should be at the financial progress of 9% or the pleaded figure of 11.3%'.

[118] Section 42 of the Act is applicable in this case as the case was decided prior to its deletion on 8 May 2018 by the Arbitration (Amendment) (No 2) Act 2018 (Act A1569/2018). It is therefore still relevant to examine the meaning of 'question of law arising out of an award' in the provision. In *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126, the Court of Appeal enumerated some non-exhaustive guidelines in respect of the application of s 42 as follows:

(a) the question of law must be identified with sufficient precision (*Taman*

Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83; *Maimunah bt Deraman (practising as an architect under the name of D' Mai Architect) v Majlis Perbandaran Kemaman* [2010] MLJU 1711;

(b) the grounds in support must also be stated on the same basis;

(c) the question of law must arise from the award, not the arbitration proceeding generally (*Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] MLJU 1697, *Exceljade Sdn Bhd v Bauer (M) Sdn Bhd* [2013] MLJU 1202;

(d) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(e) the question of law must be a legitimate question of law, and not a question of fact 'dressed up' as a question of law (*Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215);

(f) the court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties (*Exceljade Sdn Bhd v Bauer (M) Sdn Bhd*);

(g) this jurisdiction under s 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases (*Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98; [2013] 8 CLJ 655);

(h) nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable;

(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence (*Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318); and

(j) while the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

[119] This court in *Far East Holdings* however ruled that guidelines (g), (h) and (j) above were not in line with s 42 and should not be followed. It was, inter alia, held that an award may or may not be perverse, manifestly unlawful or unconscionable, unreasonable and the like, but those are not grounds for the court to intervene and are not tests for setting aside an award. The question of law must be one of law and not fact for an error of fact alone is not sufficient.

[120] We agree with learned counsel for the appellant that the award of the value of works completed was based purely on a finding of fact by the learned arbitrator and does not involve any question of law. The arguments were on

how the value of works was to be computed in the event of termination. Surely the appellant had to be compensated for works that it had performed and in this regard the learned arbitrator had duly made his finding.

[121] The basis for the Court of Appeal's decision to set aside the award for the value of works completed was that it was proper to do so on a s 42 application. In doing so, the Court of Appeal completely disregarded the decision of this court in *Far East Holdings* where it was ruled, inter alia, that:

> ... with the radical change to the statutory regime, that s 24 of AA 1952 and the law developed thereunder are not relevant under s 42.

[122] At para 116 of the judgment, this court said:

> With the common law jurisdiction of setting aside an award for 'error of the award' gone, the distinction between a general reference and a specific reference, though pertinent under AA 1952 (see *The Government of India v Cairn Energy* at paras 29–33), is not relevant.

[123] And in dealing with the correct test of what constitutes a question of law, this is what this court said:

> But there is no universal definition of 'question of law'. Nonetheless, from our survey of the authorities, we would conclude that one of the following, which is not an exhaustive list, would meet the paradigm of 'any question of law' in s 42:
>
> (a) a question of law in relation to matters falling within (2) of Mustill J's three-stage test;
>
> (b) a question as to whether the decision of the tribunal was wrong (*The Chrysalis*);
>
> (c) a question as to whether there was an error of law, and not an error of fact (*Micoperi*): error of law in the sense of an erroneous application of law;
>
> (d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal has given another (*MRI Trading*);
>
> (e) a question as to the correctness of the tests applied (*Canada v Southam*);
>
> (f) a question concerning the legal effect to be given to an undisputed set of facts (*Carrier Lumber*);
>
> (g) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premiums Brands*): this may also come under s 37 of AA 2005;
>
> (h) a question of construction of a document (*Intelek*).

[124] Then at paras 151–152, this court went on to hold that it is not every question of law that will meet the s 42 threshold:

Given that AA 2005 does not say so, we could not hold that a 'question of law' must be the same one which the arbitral tribunal was asked to determine

> But 'a point of law in controversy which has to be resolved after opposing views and arguments have been considered' is not a 'question of law' within the meaning of section 42. There would surely be 'a point of law in controversy' in every case. If 'a point of law in controversy' were a question of law, then there would be a 'question of law' arising in every award. And that, with respect, could not be right.

[125] We are also in agreement with learned counsel for the appellant that the learned High Court judge had applied the wrong test to a finding of fact by the learned arbitrator and that there was no question of law within the meaning of s 42 of the Act that warranted curial intervention.

[126] The learned arbitrator's finding of fact was that the actual financial progress (as opposed to actual physical progress) made by the appellant in relation to the completion of works as at 30 April 2012 was 28%. The learned arbitrator therefore came to the factual conclusion that the delay in financial progress as at the date of termination was below 20%, and hence it was premature for the respondent to invoke the termination clause.

[127] It was premised on his finding that the percentage of the actual financial progress was 28% that the learned arbitrator found the termination to be unlawful. Hence, the finding of the High Court that on the date of termination, the actual financial progress was either 9% or 11.37% ran contrary to his acceptance of the arbitrator's lump sum award of 28% for the drainage works.

[128] We reproduce below the learned arbitrator's finding at para 125 of the award:

> Evidence from contemporaneous documents suggest that about 28% of the drainage work had been completed as at 31 March 2012, some seven days after the termination. Whilst the Respondent (ISB) took issue with the claimant's (PPSB) presumption that the 28% as computed from CDB9/633 is the actual financial progress, the respondent's notice of intention to terminate the subcontract of 26 March 2012 signed by the director of the respondent actually corroborated the claimant's presumption. The letter states 26% of the financial progress was completed as opposed to the scheduled 78% on 26 March 2012. Quite clearly, the caimant's contention that 28% of financial progress was completed at the termination clause is plausible. Therefore in my opinion it is fair and reasonable to compensate the claimant the sum computed as 28% of RM9,250,464 (lump portion of the drainage subcontract) or RM2,590,129.92.

[129] The Court of Appeal was on the same page with the High Court that

A the 28% represented the physical progress when it said: 'At the arbitration, the appellant claimed that the value of the works done as at the date of termination should be based on physical progress at 28%' (para 46 of the judgment). This is inaccurate as nowhere in the award did the arbitrator consider the 28% as the physical progress of the drainage works at the time of termination.

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[130] What the learned arbitrator said in his award was that the appellant's (PPSB) computation which he agreed to was that '28% as computed from CBD9/633 is the actual financial progress ... Quite clearly, the claimant's (PPSB) contention that 28% of the financial progress was completed at

C termination is plausible'.

[131] The 9% and 11.37% that the learned High Court judge mentioned in his judgment is nowhere to be found in the award. Obviously it was based on

D the pleadings and the submissions of the parties. It is a matter for the arbitrator whether to accept or reject the evidence, and his award cannot be set aside on the ground of misconduct because there is no evidence to support it. The proper remedy in such a case is to require a case to be stated on the point of law as to whether there was evidence or not: see *Oleificio Zucchi SpA v Northern*

E *Sales Ltd* [1965] 2 Lloyd's Rep 496.

[132] On the issue of in findings of fact by arbitrators, what this court said in *Far East Holdings* at paras 153 and 155 are relevant:

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> [153] Where there is a question of fact, 'The arbitrators (remain) the masters of the facts. On appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial correspondences of the mistake of

G fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by the agreement to honour the arbitrator's award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrator's findings of

H fact' (*The 'Baleares'* at p 228). '... on findings of facts an arbitrator is the sole judge. Further, whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award (see *GKN Centrax Gears Ltd v Matbro Ltd* [2976] 2 Llyod's Rep 555) (*Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49 per Richard Malanjum JCA, as he then was) ...

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> [155] At any rate, s 42 only permits a reference on a discrete question of law. Under s 42, there is no jurisdiction to deal with questions of fact. As Steyn LJ put it in *The Belares*, 'on an appeal the court must decide any question of law arising from the award based on a full and unqualified acceptance of the findings of the arbitrators'. The question of law must accept the findings of fact. Hence, all argument or debate on the findings of fact of the arbitrator, on the inferences drawn by the arbitrator

from the findings of fact and or from the evidence could not and would not be entertained.

[133] In the instant case, it would appear that both the High Court and the Court of Appeal refused to accept the findings of fact by the arbitrator when they ruled that the correct value for the drainage works completed was either 9% or 11.37%. Given the learned arbitrator's finding of fact that the financial delay as at the date of termination was below 20%, he was in fact correct in applying the financial delay test to his factual finding.

[134] This correct application of the law to the facts by the learned arbitrator means that the subcontract was terminated when the financial delay threshold had not been exceeded. Therefore, the correct application of the financial delay test by the learned arbitrator did not warrant interference by the court under s 42(1) of the Act.

[135] If the reference on a question of law under s 42 is based on a qualified and non-acceptance of findings of fact by the arbitrator, such reference cannot be held to be within the meaning and scope of s 42 of the Act.

[136] Having regard to the arbitrator's approach and methodology in computing the value of works completed and the percentage used, there was no compelling reason for both the High Court and the Court of Appeal to interfere with the findings of fact by the learned arbitrator. Both courts below were therefore wrong in finding that the learned arbitrator had wrongly applied the physical delay test instead of the financial delay test in deciding whether the subcontract had been lawfully terminated by the respondent. In our view the learned arbitrator was right in finding that the subcontract had been unlawfully terminated by the respondent.

[137] We shall now deal with leave question 1, which arose from the decisions of the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697 and *Sigur Ros* where it was held that the threshold requirement stipulated by s 37 of the Act to set aside an award is 'very low' (although the courts are slow in setting aside the award) as opposed to a 'very high' threshold under s 42. The effect of the decision is that if a party cannot succeed under s 37, an application under s 42 will be futile as s 37 relates to arbitral process whereas s 42 relates to arbitral award.

[138] It is relevant to note that this court in *Jan De Nul* acknowledged and did not disturb the low threshold test laid down in *Petronas Penapisan*. Therefore the answer to leave question 1 should be obvious. We wish to add however that whether the threshold is 'very low' or 'very high', a wide discretion is vested in the court by s 37 of the Act and the decision to set aside an award

is not an automatic outcome of a finding that there had been a breach of the rules of natural justice. The court will still have to evaluate whether the discretion should be exercised in the applicant's favour in all the circumstances of the case.

[139] Like any other exercise of discretion, the discretion to set aside an award for breach of the rules of natural justice must be exercised judiciously and only when it is just to do so. The authorities are clear that in considering whether the discretion should be exercised, the court must undertake an evaluation of relevant factors such as those identified in *Kyburn*, amongst which would be the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration and leaving room for 'casual breach or occasional error'. Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in the evaluation process.

[140] *Kyburn* explained the position in the following terms:

> ... a finding of a breach of the rules of natural justice does not mean that the arbitral award must be set aside, that the power of the court to set aside an award is discretionary and will not be exercised automatically in every case. The discretion enables the court to evaluate the nature and impact of the particular breach in deciding whether the award should be set aside, the policy of encouraging arbitral finality will dissuade the court from exercising discretion when the breach is relatively immaterial or was not likely to have affected the outcome.'

[141] The 'very low' threshold for s 37 as decided in *Petronas Penapisan* and *Sigur Ros* must be understood in the context it was made, ie that compared to s 42, the threshold under s 37 is 'very low'. In other words, it is 'very low' relative to the threshold under s 42. It must be remembered that the grounds enumerated in s 37 are exhaustive and as such the court cannot set aside an award for reasons other than those that are listed.

[142] The grounds enumerated in s 37 need to be construed narrowly as they represent exceptions to the finality of arbitration awards (s 36). This is to avoid devaluing the arbitration agreement that arbitral awards are final and binding and also to preserve the autonomy of the forum selected by the parties by minimising judicial interference in arbitral awards: *Jan De Nul*.

[143] This narrow and restrictive definition is important in terms of the public policy ground which this court in *Jan De Nul* interpreted as only encompassing violations of the 'most basic notions of morality and justice or such violations that offend the fundamental principle of law and justice, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process and powers will thereby be

abused'. What is required is that the injustice had real effect and had prejudiced the basic rights of the applicant. We do not find this to be the case in the present appeals.

[144] For all the reasons aforesaid, our answers to the five leave questions are as follows:

Leave question 1 — Affirmative, that is to say the threshold requirement stipulated by s 37 of the Act to set aside an award as 'very low' as set out in the cases of *Petronas Penapisan* and *Sigur Ros* is indeed the correct test;

Leave question 2 — Negative, that is to say an engineer who relies on his own knowledge of the construction industry in arriving at a decision on the quantum of 'loss of profit' pursuant to a provision recognised by s 21(3)(b) of the Act for an arbitrator to be able to draw on its own knowledge and expertise cannot be said to be in breach of the rules of natural justice within the meaning of s 37(1)(b)(ii) read together with s 37(2)(b) of the Act;

Leave question 3 — Negative, that is to say an arbitrator relying on his own knowledge and expertise on matters of evidence relating to an industry in which he is well acquainted with will not amount to a breach of natural justice within the meaning of s 37(1)(b)(ii) read together with s 37(2)(b) of the Act;

Leave question 4 — Negative, that is to say the precept of a breach of the rules of natural justice does not extend to the arbitrator applying his own knowledge and expertise on an issue where the parties have led evidence on and which forms one of the very issues which the arbitral tribunal has to deal with, especially when the knowledge of the arbitrator has an impact on the quality of evidence required for evaluation by the tribunal; and

Leave question 5 — Negative, that is to say the decision of the arbitrator in making an award on what constitutes the value of completed works, and the basis on which such an assessment is to be made, does not constitute a 'question of law arising out of the award'.

[145] In the circumstances, both Appeal 26 and Appeal 27 are allowed with costs to the appellant.

Appeals allowed.

Reported by Ashok Kumar